NO. 94529-2

**SUPREME COURT OF THE STATE OF WASHINGTON**

HBH; SAH; and TREY HAMRICK, litigation guardian ad litem on behalf of KEH, JBH, and KMH,

Respondents,

v.

STATE OF WASHINGTON,

Petitioner.

# STATE OF WASHINGTON'S ANSWER TO BRIEFS OF AMICI

ROBERT W. FERGUSON
Attorney General

ALLYSON S. ZIPP, WSBA No. 38076
ASSISTANT ATTORNEY GENERAL
P O Box 40126
Olympia WA 98504-0126
(360) 586-6300
OID No. 91023

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**



**Constitutional Provisions**

## I. INTRODUCTION

This case is not, as Amici argue, about the State trying to avoid its responsibility to protect foster children. To the contrary, the Legislature has clearly outlined the duties of Department of Social & Health Services (DSHS) and its social workers to license foster parents, monitor children in foster homes, coordinate court-ordered services, and investigate child abuse and neglect. What has happened here is that the Court of Appeals' decision below circumvented those statutory duties and the role of the Legislature in favor of imposing an amorphous common law duty. That duty reflects an erroneous expansion of the common law and imposes liability that is unmoored from the comprehensive statutory design of Washington's foster care system.

The arguments of Amici King County Sexual Assault Resource Center (SARC) and Washington State Association for Justice Foundation (WSAJ) attempt to justify the imposition of a *Restatement (Second) of Torts* (*Restatement*) § 315(b) (1965) duty. Both Amici fail. Contrary to SARC's brief, the fact that case law imposes statutory and other common law duties on DSHS does not mean that it imposes the § 315(b) duty on DSHS. And contrary to WSAJ's brief, Washington precedent that imposes the § 315(b) duty on hospitals, schools, and churches is not consistent with imposing the § 315(b) duty on DSHS social workers.

Ultimately, imposing the Court of Appeals' § 315(b) duty on DSHS social workers is bad policy. As articulated by the Court of Appeals, the § 315(b) duty provides no clear guidance to social workers on *how* they are to protect children. Indeed, the Court of Appeals' decision states explicitly that the duty it imposes would not necessarily be satisfied by compliance with DSHS policy, much less with the foster care statutes.

The statutory duties the Legislature places on DSHS social workers are the best and most effective means to create accountability in the foster care system. Statutory causes of action, like that recognized by this Court as arising from RCW 26.44.050 under *Bennett v. Hardy*,[1] bind social workers' potential liability in tort to their actual responsibilities as defined by the Legislature. And, fittingly, under statutory causes of action, DSHS faces liability for negligence that is within its power to prevent.

## II. AMICI'S FACTUAL ERRORS

Before addressing Amici's legal arguments, it is important to set the record straight regarding two persistent factual errors made in the Court of Appeals' decision and repeated by WSAJ in its Statement of the Case. Brief of Amicus Curiae WSAJ (WSAJ Br.) at 1-3. These two errors form the evidentiary basis for the Court of Appeals' flawed conclusion that a

[1] *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

reasonable jury could have found "the allegedly deficient health and safety checks" caused Plaintiffs' harm. *HBH v. State*, No. 47438-7, slip op. (Wash. Dec. 13, 2016), *as amended on denial of reconsideration* (Apr. 18, 2017) (Slip op.) at 18-19.

First, WSAJ repeats the Court of Appeals' factual error that therapy records showed SAH and HBH were "sexually acting out together" *during* their pre-adoption period with the Hamricks. Slip op. at 18; s*ee* WSAJ Br. at 2. Plaintiffs' expert did offer that testimony, but the therapist's chart note she relied upon does not substantiate that fact.[2] Rather, the chart note refers to the girls' *past* history of sexually acting out *before* they arrived at the Hamricks:

> A safety plan needs to be set up next session for the home environment due to *the past history* of the girls exhibiting signs of abuse by acting out in [sexual] ways[.][3]

Plaintiffs introduced no other evidence that SAH and HBH were sexually acting out during their pre-adoption period with the Hamricks. The trial record instead shows that SAH and HBH were sexually acting out in 1995, and that DSHS's investigation of that behavior revealed that their father was sexually abusing them, after which they were removed from his care.[4]

---

[2] RP (2/9/15) at 48-49 (testimony of Barbara Stone discussing Ex. 219, therapist chart note dated 6/16/2000) (chart note *also available* at CP 281).

[3] Ex. 219 at 17 (Bates 06040017) (emphasis added); *also available at* CP 281.

[4] RP (2/19/15) at 144-46.

The trial record shows that SAH and HBH had ceased their sexually reactive behavior by the time they were placed with the Hamricks.[5]

Second, WSAJ erroneously asserts that DSHS "failed to follow up with one of the Plaintiffs who had requested a private meeting with a caseworker." WSAJ Br. at 2. This muddles the Court of Appeals' error that the record "shows that SAH wanted someone to give her the opportunity to tell what [sexual abuse] was happening to her" because "she asked to talk privately with a therapist." Slip op. at 18. But the record shows SAH had regular opportunities to talk privately with the therapist.[6] And it is implausible to speculate that SAH wanted to tell the therapist about Scott Hamrick's sexual abuse, given her own testimony that during the pre-adoption period, she did not think his touching was sexual.[7]

Ultimately, after hearing five weeks of testimony, the trial judge concluded that the evidence was insufficient for Plaintiffs' pre-adoption claims to go to the jury. While the judge acknowledged Plaintiffs' evidence was sufficient for them to argue there had been deficient health and safety

---

[5] RP (2/19/15) at 146, 149; Ex. 115 at 5 (Bates 01140036).

[6] One therapist's chart note documenting a session in which the therapist focused on HBH, states: "[SAH] was anxious to speak with me alone, and I told her she would have her turn next time." Ex. 219 at 25 (Bates 06040025). Other chart notes show SAH had regular opportunities to meet privately with the therapist. *See, e.g.*, Ex. 219 at 22 ("[m]et with [HBH] and [SAH] individually"), at 26 ("[m]et with each girl separately"), at 27 ("[w]orked with [HBH] and [SAH] individually").

[7] SAH testified "as a young girl, [Scott Hamrick] touching as a father figure, I didn't think that it was sexual[.]" RP (2/11/15) at 64-65. HBH testified that her abuse by Scott Hamrick did not begin until *after* she was adopted. RP (2/19/15) at 126.

visits, she found there was no evidence that more or different visits would have uncovered abuse or caused the adoption to be denied.[8] As the judge stated, "I can't really see there are any claims based on anything [social worker] Mary Woolridge did or did not do."[9] "[T]here were so many people involved [with Plaintiffs] that were handling this prior to the adoption, all of these other voices that were coming in saying, no, there was nothing to show there was any abuse."[10]

## III. ARGUMENT

### A. Contrary to SARC's Brief, Case Law That Imposes Statutory and Common Law Duties on DSHS Does Not Recognize the Common Law § 315(B) Duty Claimed By Plaintiffs

SARC aims its arguments at a strawman. It claims, incorrectly, that the State "maintains the only recognized claim by an abused child against DSHS is negligent investigation pursuant to RCW 26.44.050." Brief of Amicus Curiae SARC (SARC Br.) at 5. That is neither the State's position nor the issue. Thus, when SARC knocks over its own false premise and shows that this Court has recognized grounds for liability other than under RCW 26.44.050, it proves nothing. The cases relied upon by SARC do not demonstrate that the common law § 315(b) duty claimed by Plaintiffs should apply to DSHS.

---

[8] RP (3/5/15) at 83.
[9] RP (3/5/15) at 83-84.
[10] RP (3/5/15) at 83.

First, *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991), does not "recognize a cause of action for negligent placement of a child under RCW 13.34," as vaguely summarized by SARC. SARC Br. at 5. *Babcock* addresses defendant immunity and makes no holding about the underlying claim, which it describes with a passing phrase as "negligent foster care placement." *Babcock,* 116 Wn.2d at 599. *Babcock* does not recognize any common law claim, and particularly not a claim based on a duty defined by *Restatement* § 315(b). *Babcock*'s holding focuses on immunity.

SARC's reliance on a quotation from *Tyner v. State Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), that SARC says "characterized *Babcock,*" shows nothing more. SARC Br. at 5. Notably, SARC omits the *Tyner* Court's statement that "[t]he specific holding of *Babcock* dealt with immunity, but the case recognized that *the gravamen of the plaintiff's claim was 'negligent investigation.*'" *Tyner*, 141 Wn.2d at 79 (quoting *Babcock*, 116 Wn.2d at 610) (emphasis added). Given that *Tyner* considered whether a statutory negligent investigation claim under RCW 26.44.050 was available to parents as well as children (*Tyner*, 141 Wn.2d at 76-82), the statutory basis of the duty in both cases is clear. Thus, contrary to SARC's brief, *Babcock* and *Tyner* concern negligent investigation under RCW 26.44.050, a claim the Plaintiffs abandoned in this case. Slip op. at 10 n.2.

This fair reading of *Tyner* and *Babcock* means there is no substance to SARC's assertion that *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), "did not limit *Babcock*." SARC Br. at 6. There was nothing to limit.

Nor does the holding in *M.W.* support SARC's position that a § 315(b) duty applies to DSHS social workers. SARC's argument simply obscures the specific common law duty recognized in *M.W.* SARC Br. at 6. *M.W.* recognizes the "existing common law duty of care not to negligently harm children" by, for example, "dropping a child," and explains that particular common law duty is distinct from the "statutory concerns" of RCW 26.44. *M.W.*, 149 Wn.2d at 598, 600. The State acknowledges that it has the same common law duty of care as a private person when, for example, a state employee physically handles a child. That is the import of the Legislature's waiver of state sovereign immunity for "tortious conduct to the same extent *as if* [the State] were a private person or corporation." RCW 4.92.090 (emphasis added). But SARC's observation about the common law duty discussed in *M.W.* shows nothing about the issue here—whether a very different common law duty, imposed on schools, hospitals, and church camps under *Restatement* § 315(b), applies to DSHS social workers.

SARC offers another inapposite case in *Lewis v. Whatcom Cty*, 136 Wn. App. 450, 149 P.3d 686 (2006). SARC Br. at 7. The only issue raised in *Lewis* is the purely legal question of whether the statutory cause of action for negligent investigation under RCW 26.44.050 extends to investigation of reports of abuse by a non-parent. *Lewis*, 136 Wn. App. at 453. That issue has nothing to do with the § 315(b) duty.

As for SARC's block quote from *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 402 P.3d 346 (2017) (petition for review pending) (SARC Br. at 7-8), that quotation and opinion depend on an erroneous view of *M.W.* and a misreading of *Babcock* and *Tyner*—the same errors propounded by SARC. Contrary to the *C.L.* quotation, this Court never "'implicitly approved'" the negligence claims recognized by the *C.L.* Court under § 315(b). SARC Br. at 7 (quoting *C.L.*, 200 Wn. App. at 196-97). The threshold issue of defining and applying the § 315(b) special relationship test was not addressed in *Babcock* or *Tyner*.

SARC misses the point of the State's reliance on *Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006), and *Sheikh*'s discussion of the statutes that safeguard the health and welfare of dependent children. SARC Br. at 8. The State cited the analysis in *Sheikh* because the Court examined whether a common law duty was created by statutes governing the child welfare system. *See* State's Supplemental Brief (State Suppl. Br.) at 15, 18-19;

*Sheikh*, 156 Wn.2d at 453-56. Based on those statutes, *Sheikh* concluded there was no common law "take charge" relationship between DSHS and foster children requiring DSHS to protect third parties by controlling those children. *Id.* at 454. Those child welfare statutes are relevant to this case, too. They must be examined to decide if DSHS has a special relationship supporting a common law § 315(b) duty to protect foster children.

Nor is there merit to SARC's argument that a § 315(b) duty is "the logical conclusion" from the State's interest in protecting all children. SARC Br. at 9. To the contrary, that argument is illogical because it has no limits. SARC's brief admits, as it must, that the State has a relationship with every child *and every individual* in the sense of having some state desire to protect. SARC Br. at 9. Under SARC's logic, the mere existence of a state interest for purposes of any governmental program would result in a § 315(b) duty. Thus, while the State's interest in protecting children (including foster children) is very real, that interest cannot be what determines the existence of a duty under § 315(b).

Similarly, cases involving churches do not hold that the § 315(b) duty arises simply because of a compelling interest in protecting children, as SARC argues. SARC Br. at 9-10 (citing *C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wn.2d 699, 985 P.2d 262 (1999); *M.H. v. Corp. of Catholic Archbishop of Seattle,* 162 Wn. App. 183,

252 P.3d 914 (2011); and *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730 (2013)).

In *C.J.C.*, notwithstanding that compelling interest, a majority of the Court did not endorse the notion that the church had a § 315(b) duty based on "a private, nonchurch-related child care arrangement between members of a church congregation." *C.J.C.*, 138 Wn.2d at 729-30 (Madsen, J., concurring/dissenting). Only four *C.J.C.* Justices endorsed the four-part test for a § 315(b) duty that was announced in the lead *C.J.C.* opinion. *Id.* at 724. *M.H.* applies the non-majority *C.J.C.* four-part test. *M.H.*, 162 Wn. App. at 190-92. And *N.K.* recognizes that a church's duties are the same as a school's if abuse "occurs during church activities, when the children are in the 'custody and care' of the church." *N.K.*, 175 Wn. App. at 529. Thus, *N.K.* recognizes that the existence of a § 315(b) duty turns on whether the actor exercised custodial care and control over a vulnerable young person—where it does, a § 315(b) special relationship exists and creates the duty to use due care to protect from third parties.

SARC's citation to *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003), repeats the same overly generalized logic that a § 315(b) duty arises simply because of important state or private interests. *Braam* concerns substantive due process rights for foster children. *Braam*, 150 Wn.2d at 698. But the existence of those rights sheds no light

on whether a § 315(b) duty exists. Indeed, "'the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'" *Braam*, 150 Wn.2d at 699 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 1043 (1998)).

The Court should see through SARC's argument that DSHS is subject to a common law § 315(b) duty simply because the State has statutory and common law duties in other, readily distinguishable contexts.

### B. Contrary to WSAJ's Brief, This Court's Precedent Is Not Consistent With DSHS Social Workers Having a § 315(B) Special Relationship With Foster Children

Like SARC, WSAJ aims its argument at a strawman, contending the State "urges this Court to limit the special relationships giving rise to a duty of protection to those involving physical custody." WSAJ Br. at 9 (citing State Suppl. Br. at 12). As discussed in this section, the State does not advance such a crabbed rule. WSAJ, instead, urges this Court to define the § 315(b) special relationship *solely* in terms of *entrustment*. Without context, the term *entrustment* is an abstraction. In the context of this Court's § 315(b) precedent, *entrustment* means exercising custodial care and control, just as the State has argued.

This Court should reject WSAJ's version of *entrustment*, under which DSHS would have a § 315(b) special relationship with foster children

solely because it is "the entity entrusted with responsibility for removing children from their homes and placing them in the foster system[.]" WSAJ Br. at 4. DSHS's statutory responsibilities for removal and placement of children—as well as licensing foster parents, monitoring foster homes, reporting, and investigating reports of child abuse and neglect—do not involve the direct custodial care and control this Court has found necessary to create a § 315(b) special relationship. Tort duties arising from DSHS statutory responsibilities should flow from the statutes themselves, as in *M.W.*[11]

### 1. Washington precedent confirms that custodial control over the plaintiff's environment is a defining factor in the existence of a § 315(b) special relationship

Attacking its overstatement about the State's position, WSAJ argues against "limiting the duty to protect to cases of physical custody[.]" WSAJ Br. at 15. Given that many special relationships recognized by this Court do not involve a defendant's literal physical *custody* of the plaintiff, this proposition stands already proven. *See Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 44, 929 P.2d 39 (1997) (recognizing special relationships

[11] In *M.W.*, this Court recognized the Legislature's implied intent to create a statutory cause of action in tort under RCW 26.44.050, applying the test established under *Bennett v. Hardy*, 113 Wn.2d at 919, to analyze: (1) whether the plaintiff was within the class of persons for whose benefit the statute was enacted, (2) whether the legislative intent supports a remedy, and (3) whether the underlying purpose of the statute is consistent with inferring a remedy. *M.W.*, 149 Wn.2d at 596-602.

between innkeepers and guests, common carriers and passengers, and business establishments and customers).

However, what WSAJ fails to acknowledge is that the Court relies on custodial control of the plaintiff and the plaintiff's environment in determining whether there is a § 315(b) special relationship, and corresponding duty to control third parties who might harm a plaintiff. And logically so—controlling the plaintiff's environment is what enables a defendant to protect a plaintiff from those third parties as required by the § 315(b) duty.

For example, WSAJ erroneously describes *N.L. v. Bethel School District*, 186 Wn.2d 422, 378 P.3d 162 (2016), as extending the § 315(b) special relationship *duty* outside the custodial context. WSAJ Br. at 16. It does not. In *N.L.*, a school principle was notified that a particular student was a registered sex offender but took no action in response. *N.L.*, 186 Wn.2d at 426. The student persuaded the plaintiff, also a student, to leave the school grounds with him, where he raped her. *Id. N.L.* expressly states that "the duty arose" and the alleged breach occurred while the plaintiff was in the school's custody. *Id.* at 432. The decision then holds that the plaintiff need not have been "in the school's custody at the time of the *injury* for the duty to have existed." *Id.* at 434. *N.L.* thus confirms that the school's

custodial control is a determining factor in whether the § 315(b) special relationship and corresponding duty exist.

Indeed, WSAJ appears to acknowledge this in a footnote, saying "[i]n the school context, a student's release from the school's custody generally returns the student to the custody of the parents *and relinquishes the school's responsibility*." WSAJ Br. at 16 n.8 (emphasis added). Thus, when the school transfers away its custody of the student, its § 315(b) special relationship with, and § 315(b) duty to, the student ends—unless and until such time as that custody transfers back to the school again. *Bell v. Nw. Sch. of Innovative Learning*, 198 Wn. App. 117, 126, 391 P.3d 600 (2017) (holding that school did not owe duty of care to plaintiff-student after it transferred custody of student to third party). *N.L.* and *Bell* both illustrate the State's point—the § 315(b) special relationship, and corresponding duty, *exist* because—and while—the actor has custodial control over the plaintiff and the plaintiff's environment, under circumstances that the common law has recognized as imposing a duty to prevent harm by third parties.

WSAJ also relies on *Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001), for the proposition that the § 315(b) special relationship "does not require custody." WSAJ Br. at 16-17. *Caulfield* does state: "a special relationship duty arises when the relationship has a *direct*

*supervisory component*, but does not always required the presence of a custodial relationship." *Caulfield*, 108 Wn. App. at 255 (emphasis added) (internal quotes omitted). But as the facts in *Caulfield* show, its § 315(b) special relationship arises from the government case managers' direct supervisory control over Mr. Caulfield and his environment. In *Caulfield*, the government case managers directly selected and employed the in-home caregiver who was providing care for Mr. Caulfield in the isolated setting of his private home. *Id.* at 246. Direct supervision of Mr. Caulfield's care included "establishing Caulfield's service plans, monitoring his care, and providing crisis management, including terminating in-home care if it was inadequate to meet his needs." *Id.* at 256. Thus, in Mr. Caulfield's case, direct supervisory control over his environment created a § 315(b) special relationship.[12] This is the same as the custodial control exercised by a nursing home, school, or hospital.

Superficially, responsibilities of the case managers in *Caulfield* sound a little like responsibilities of social workers for children in foster families. But the situation in *Caulfield* is plainly distinguishable from the

[12] WSAJ also claims this proposition is supported by the recent decision, *C.L.*, 200 Wn. App. at 189 (State's petition scheduled for review on Mar. 6, 2018). WSAJ Br. at 16-17. *C.L.* makes no independent contribution to the Court's analysis here. First, it makes the same erroneous claims about this Court's precedent as does SARC. *Cf. id.* at 196-98; *supra* Section III.A. Second, it follows the Court of Appeals' erroneous decision in this matter. *C.L.*, 200 Wn. App. at 198-99.

foster family context. First, the direct employment relationship in *Caulfield*, including direct supervisory responsibility for Mr. Caulfield's care, bears no resemblance to the system for licensing foster parents and vesting those parents with supervisory responsibility for foster children that the Legislature has selected as the predominant model for providing homes to children. RCW 74.13, 74.15. Second, Mr. Caulfield's situation lacked the robust statutory circle of protection that the Legislature has created for foster children placed in foster homes, including the extensive statutory responsibilities imposed on social workers, the court-ordered services that routinely bring children into contact with other mandatory reporters, and judicial oversight of foster care placements by the Juvenile Court. RCW 13.34. Third, it is worth noting that Mr. Caulfield's case managers knew he had "complaints about his caregiver," had documented that his health was deteriorating under the caregiver's care, yet had failed to take appropriate action. *Caulfield*, 108 Wn. App. at 246. In the foster care context, on those facts, a plaintiff has statutory causes of action for negligent reporting and investigation under RCW 26.44.030 and RCW 26.44.050.

As *N.L.*, *Bell*, and *Caulfield* illustrate, Washington precedent relies on a defendant's control over a plaintiff's environment in determining whether a § 315(b) special relationship and corresponding duty exist.

### 2. This Court's precedent illustrates that in the § 315(b) context, *entrustment* means exercising direct custodial care and control

WSAJ asserts that Washington case law has "broadly described" the special relationship as "one in which a defendant has been 'entrusted' with the responsibility of protecting another who is in some way vulnerable and in need of protection." WSAJ Br. at 13. WSAJ seizes on the term *entrustment*, claiming it is the "common principle" defining a special relationship. WSAJ Br. at 15. However, the same Washington decisions that broadly describe the special relationship in terms of *entrustment* then proceed to illustrate what *entrustment* means in practice—actual custodial care and control of a vulnerable person in their environment. This is the nature of the § 315(b) special relationship described by this Court, and the rule urged by the State.

To support its *entrustment* approach, WSAJ relies on *Niece*, 131 Wn.2d at 39 (finding special relationship between nursing home and its resident). WSAJ Br. at 13. *Niece* states: "The duty to protect . . . arises where one party is 'entrusted with the well being of another.'" *Niece*, 131 Wn.2d at 50 (quoting *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 440, 874 P.2d 861, *review denied*, 125 Wn.2d 1006 (1994)). But *Niece* immediately elaborates: "Given [plaintiff's] total inability to take care of herself, [defendant] was responsible for every aspect of her well-being. This

responsibility gives rise to a duty to protect[.]" *Id.* at 50. Thus, responsibility for direct care of every aspect of another's well being is how *Niece* defines *entrustment*.

WSAJ also points to *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (finding special relationship between business and its invitee). WSAJ Br. at 13. After relying on *Niece*, *Nivens* holds that "a *special relationship exists* between a business and an invitee *because* the invitee enters the business premises for the economic benefit of the business. As with physical hazards on the premises, the *invitee entrusts* himself or herself to the *control of the business owner* over the *premises* and to the *conduct of others on the premises*." *Nivens*, 133 Wn.2d at 202 (emphasis added). Thus, an invitee's reliance on a business's control over the premises and third persons on the premises is how *Nivens* defines *entrustment*.

Turning to Court of Appeals' precedent, WSAJ cites *Lauritzen*. WSAJ Br. at 14. *Lauritzen*, which *Niece* relied upon heavily, said of the "entrustment aspect" of the special relationship:

> in all the situations where a ***special relationship*** has been recognized, ***the party*** that has been ***found*** to have a ***legal duty*** was in a ***position to provide protection*** . . . ***because*** he or she had ***control over*** access to the ***premises*** that he or she was ***obliged to protect***. Employers and innkeepers, as we have noted above, are obliged to provide some protection to employees and guests on their premises. The same rationale

> applies to schools, hospitals, business establishments, and common carriers.

*Lauritzen*, 74 Wn. App. at 440-41 (emphasis added) (declining to find a special relationship between an automobile driver and passenger). Thus, in *Lauritzen*, too, *entrustment* means custodial control over the environment.[13]

In sum, Washington precedent using the term *entrustment* has found a § 315(b) special relationship where a defendant has control over the premises and third persons on the premises (*Nivens*, 133 Wn.2d at 202; *Lauritzen*, 74 Wn. App. at 440-41), and where that control involves *direct* responsibility for the care of every aspect of another's well being (*Niece*, 131 Wn.2d at 50). This actual custodial care and control over the plaintiff and the plaintiff's environment, sometimes labeled *entrustment*, is what defines a § 315(b) special relationship and justifies the § 315(b) duty.

### 3. Under this Court's § 315(b) precedent, the foster care statutes do not create a § 315(b) special relationship between DSHS social workers and foster children

WSAJ reaches the wrong conclusion when it claims that DSHS and its social workers should carry the § 315(b) duty simply because DSHS is "the entity entrusted with responsibility for removing children from their

[13] As for the two other Court of Appeals decisions cited by WSAJ, they add no meaningful support for its view of *entrustment*. WSAJ Br. at 13-14. WSAJ's quote from *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 545, 184 P.3d 646 (2008), simply paraphrases the *entrustment* sentence from *Niece*. And WSAJ's quote from *Funkhouser v. Wilson* quotes from *Lauritzen*. *Funkhouser v. Wilson*, 89 Wn. App. 644, 660, 950 P.2d 501 (1998), *aff'd in part and remanded*, *C.J.C.*, 138 Wn.2d 699 (1999).

homes and placing them in the foster system." WSAJ Br. at 4. The tools the Legislature adopted to protect foster children impose specific responsibilities on DSHS social workers and others. These statutory responsibilities do not create the "special relationship" of custodial care and control that this Court requires for a common law § 315(b) duty.

When children are removed from their home it is due to abuse or neglect in that home. They are then placed in foster care, where "DSHS is required to ensure that foster care placements are in the least restrictive, most family-like setting available." *Sheikh*, 156 Wn.2d at 453. To accomplish this goal of providing a home-like setting in foster care, a comprehensive statutory scheme imposes appropriate licensing requirements for foster homes, empowers foster parents, and seeks to maintain a sufficient number of foster homes. Specifically, the Legislature authorizes DSHS "to place the child" in a "foster family home or group care facility licensed pursuant to chapter 74.15 RCW." *See* RCW 13.34.130(1)(b)(ii).

While the child is placed with a foster family, "[f]oster parents are responsible for the protection, care, supervision, and nurturing of the child in placement." RCW 74.13.330. While the child is in a foster home, the child's social worker has responsibilities defined and limited by statute, for example, to "coordinate and integrate" services ordered by the Juvenile

Court. RCW 13.34.025. But the statutes do "not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate" services for the child and family. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26-29, 84 P.3d 899, *review denied,* 152 Wn.2d 1018 (2004).[14]

Of course, DSHS social workers have statutory duties related to protecting the child—for example, mandatory reporting and investigation duties imposed by RCW 26.44. But the Legislature did not authorize or direct social workers to be embedded in foster homes, providing direct custodial or supervisory control and care for the child. Because the circumstances that create the common law § 315(b) special relationship duty do not exist, the duty should not be imposed on DSHS social workers.

### C. Contrary to WSAJ's Brief, Neither The *Restatement (Second) of Torts* Nor WSAJ's Foreign Cases Support Imposing a § 315(b) Duty on DSHS Social Workers

WSAJ's examination of *Restatement* §§ 315, 314A and 320, proposes a strained construction for what those sections mean by custody,

[14] As for SARC's analysis of statutes and regulations, it is generalized and of little assistance. SARC Br. at 12-13. SARC cites RCW 74.13.031(1), which indicates that "safeguard[ing] the health, safety and well-being of children . . . receiving care away from their own homes" "is paramount over the right of any person to provide care." That protecting children is important is beyond dispute, but it begs the question of whether § 315(b) applies.

SARC also points to the RCW 74.13.030, which directs the Secretary of DSHS to develop policies and regulations to assess a prospective foster parent's ability to care for children. SARC Br. at 12. Such a statute could be relevant if a party were claiming that it created a cause of action under *Bennett v. Hardy*, *supra*, but that issue is not raised here.

and derives from it the flawed conclusion that DSHS's legal custody of foster children supports imposing a § 315(b) duty on DSHS social workers under the *Restatement*. WSAJ Br. at 11-13.

As for the four foreign decisions cited by WSAJ, only two even address *Restatement* § 315(b), and they do not support imposing a § 315(b) duty on DSHS social workers. Rather, those decisions involve other states claiming sovereign immunity as a defense to those states' statutory duties to investigate reports of child abuse. Here, the State does not claim that it has sovereign immunity from its statutory duties, so those foreign decisions have no bearing on the Court's analysis.

### 1. By "taking custody" the *Restatement* means exercising control in the physical world over the plaintiff's environment

This Court should reject WSAJ's flawed argument that "custody" as used in *Restatement* §§ 315(b), 314A, and 320 is met simply by "taking" legal custody, without regard to exercising actual custodial control over the plaintiff and the plaintiff's environment. WSAJ Br. at 13, 15. The proposition yields the absurd result that legal custody creates a § 315(b) special relationship duty, without regard to the defendant's actual ability to protect a plaintiff by *controlling the actions of third persons*, which is basis of the *Restatement* duties. This cannot be the law.

WSAJ notes that while "Section 315(b) contains no reference to custody," Sections 314A(4) and 320 both refer to "[o]ne who is required by law to take or who voluntarily *takes the custody* of another[.]" WSAJ Br. at 12; *Restatement* §§ 314A(4), 320 (second quote) (emphasis added). The language of those sections shows that by custody the *Restatement* does not mean the abstract construct of legal custody, but rather a type of custody that provides control over the physical environment.

Section 320 applies when an actor "takes the custody of another under circumstances such as to *deprive* the other of his normal power of self-protection or to *subject* him to association with persons likely to harm him." *Restatement* § 320 (emphasis added). Depriving a person of their ability to protect themselves or subjecting a person to compelled association with others describe forcing things to happen in the physical world. Legal custody does not have that force. Comment *a* confirms this, listing actors to whom the rule applies, all of whom exercise the type of custody that involves control over the physical environment, rather than legal custody. *See Restatement* § 320 cmt. *a*.

Section 314A(4) imposes on one who "takes the custody of another" "a similar duty" to that of a common carrier to its passengers, an innkeeper to its guests, and a possessor of land to its invitees. *Restatement* § 314A. These duties likewise involve the type of custody that provides control over

the physical environment, rather than legal custody. This makes sense. The rationale of these *Restatement* § 315(b) special relationship duties is that the party with the legal duty is "in a position to provide protection from . . . third parties because he or she ha[s] control over access to the premises that he or she [i]s obliged to protect." *Lauritzen*, 74 Wn. App. at 440-41.

Ultimately, WSAJ engages in this textual analysis to support its argument that "DSHS 'takes custody' of children" for purposes of a *Restatement* § 315(b) duty. WSAJ Br. at 15-16. That argument is flawed. Legal custody does not support imposing on DSHS a § 315(b) duty to control the conduct of foster parents. The custody that a school has of a student, for example, bears no resemblance to DSHS social workers "remov[ing] children from their homes" and "monitor[ing] their placement." WSAJ Br. at 18. These functions, and the others that are statutorily assigned to DSHS and its social workers do not in any real sense constitute "tak[ing] the custody" of children for purposes of the duty articulated by *Restatement* §§ 315(b), 314A, and 320.

**2. The foreign law decisions cited by WSAJ do not support imposing a § 315(b) duty on DSHS social workers**

The four foreign decisions cited by WSAJ do not support imposing a § 315(b) duty on DSHS. (WSAJ does not argue directly that they do, offering them in connection with its sovereign immunity analysis.)

WSAJ Br. at 5 n.2. Two of the decisions do not mention § 315(b) at all. *See LaShay v. Dep't of Soc. & Rehab. Servs.*, 625 A.2d 224 (Vt. 1993); *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So.2d 258 (Fla. 1988). The other two decisions involve the states of Vermont and Hawaii claiming sovereign immunity as a defense to state statutory duties to investigate reports of child abuse. *See Sabia v. State*, 669 A.2d 1187 (Vt. 1995); *Kaho'ohanohanos v. Dep't of Human Servs., State of Haw.*, 178 P.3d 538 (Haw. 2008).

In *Sabia* and *Kaho'ohanohanos*, those states argued that notwithstanding a state statutory duty to investigate reports of child abuse, the state had no liability in tort because of state sovereign immunity. *Sabia*, 669 A.2d at 1192; *Kaho'ohanohanos*, 178 P.3d at 557. Each court rejected the state's sovereign immunity defense, holding that the state's statutory duty to investigate reports of child abuse was sufficiently analogous to a common law duty under *Restatement* § 315(b) to defeat the state's defense of sovereign immunity. *Sabia*, 669 A.2d at 1195; *Kaho'ohanohanos*, 178 P.3d at 562. Of course, here, Washington State does not deny responsibility under its statutory duties, including the duty to investigate under RCW 26.44.050. And Washington State does not claim that it has sovereign immunity from those statutory duties. Consequently, these cases have no bearing on the Court's analysis here.

### D. The Waiver of Sovereign Immunity Confirms the Legislature Did Not Intend to Allow Common Law § 315(b) Liability For DSHS's Implementation of Foster Care Statutes

The analysis of Washington's sovereign immunity by WSAJ is remarkably consistent with the State's argument. To be clear, and to show that consistency, the State admits that it is not arguing it is immune from an *applicable* common law duty. Nor is the State arguing that sovereign immunity exists "merely because the challenged conduct is undertaken only by the government." WSAJ Br. at 5.

Rather, the State asserts that the statutory waiver of sovereign immunity for tort liability confirms why *Restatement* § 315(b) should not be extended, square-peg-in-round-hole-fashion, to impose liability on DSHS for negligent performance of statutory obligations. DSHS's statutory responsibilities are so different from the custodial care and control that exemplify the special relationship required for a § 315(b) duty that recognizing that duty here would contradict the Legislature's intent.

The waiver statute provides: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090. This language expresses a particular legislative intent, which WSAJ recognizes amounts to whether "the government's conduct falls within an existing common law doctrine."

WSAJ Br. at 7. In other words, the Legislature has waived sovereign immunity for State conduct that would create common law tort liability if performed by a private entity. Thus, as *M.W.* recognizes, because a private person would have common law tort liability for negligently dropping a child, so too would a DSHS social worker. *M.W.*, 149 Wn.2d at 598. In this manner, the Legislature waives immunity for misconduct "as if" the State were a private party—comparison to private conduct is explicit in the statute. RCW 4.92.090.

The governmental conduct at issue here—DSHS's implementation of the statutes concerning licensing foster homes, monitoring foster children in those homes, coordinating court-ordered services, and investigating reports of child abuse and neglect—falls outside existing common law doctrines. Common law doctrines have not developed around these activities because private entities do not engage in them. Thus, when this conduct is examined "as if" DSHS were a private entity, the conduct does not fall within an existing common law doctrine.

Failure to acknowledge that a statutory duty falls outside of existing common law doctrine creates a risk of imposing common law liability beyond that contemplated by the legislative waiver. Doing so would be in derogation of the Legislature's constitutional authority to "direct by law, in

what manner, and in what courts, suits may be brought against the state." Wash. Const. art. II, § 26.

### E. Imposing a § 315(b) Duty on DSHS Social Workers Would Be Bad Policy

As articulated by the Court of Appeals, the § 315(b) duty provides no clear guidance to social workers on *how* they are to protect children. The Court of Appeals stated explicitly that the duty it imposed is not necessarily satisfied by a social worker complying even with DSHS policy, much less statutes. Slip op. at 17 n.6 ("We do not suggest that compliance with DSHS policies is necessarily enough to ensure compliance with the duty."). If the § 315(b) duty *is* tied to complying with foster care statutes, then more direct accountability will be created through statutory causes of action for negligent failure to comply with those statutes.

Faced with a duty to protect children that is unmoored from legislation, social workers may believe they are being directed to regard all foster parents as potential abusers. But adopting a stance of pervasive suspicion towards foster parents would be inconsistent with the Legislature's decision to rely on the rigorous foster parent licensing process to qualify private individuals who desire to become foster parents. RCW 74.15. It would also likely be detrimental to the foster care system by

corroding interactions between social workers and foster parents, and reducing the willingness of worthy individuals to become foster parents.

The Court of Appeals' amorphous § 315(b) duty, rather than protecting foster children, may actually harm them by destabilizing foster placements overall. A duty unmoored from statute may increase the likelihood of social workers moving children without reasonable cause to believe that abuse or neglect is occurring. Even the *Restatement* does not impose a § 315(b) duty without knowledge.[15] And as this Court recognized in *Braam*, "'[p]lacement disruptions can be harmful to children by denying them consistent and nurturing support.'" *Braam*, 150 Wn.2d at 694 (quoting RCW 74.13.310).

The invocation by Amici of the State's *parens patriae* power is likewise immaterial. *Parens patriae* is simply a type of sovereign power, like police power. It denotes the State's historical authority to act to protect children—and the general public. *See In re Custody of Smith*, 137 Wn.2d 1, 16, 969 P.2d 21 (1998). *Parens patriae* power is entirely different from the fact-based "special relationship" that grounds the common law *Restatement* § 315(b) duty. And relying on *parens patriae* power as the source of the

[15] Section 315 articulates a duty to control the conduct of third persons, and Sections 314A(4) and 320, which state the relations that give rise to the § 315(b) duty, do not impose that duty unless a defendant knows or has reason to know that a plaintiff is in particular need of protection. *See Restatement* §§ 315, 314A, 320, and comments thereto.

§ 315(b) duty leads to absurd consequences: if *parens patriae* power alone creates a § 315(b) duty, then the State would owe a tort duty to protect the entire populace from all third parties. That cannot be the law.

## IV. CONCLUSION

Washington statute, Washington precedent, the *Restatement*, and judicial restraint all run counter to the Court of Appeals' decision. The Legislature has imposed statutory duties on DSHS and its social workers for licensing, monitoring, coordinating services, and investigating reports of child abuse and neglect. But these statutory duties do not create the kind of "special relationship" with foster children that Washington precedent requires for a common law § 315(b) duty. Washington's constitution vests the Legislature with the authority to "direct by law, in what manner, and in what courts, suits may be brought against the state." Const. art. II, § 26. The Legislature has created the foster care system by statute, and it is from these statutes that DSHS duties in tort arise. The Court of Appeals' decision imposing a common law § 315(b) duty on DSHS should be reversed.

RESPECTFULLY SUBMITTED this 6th day of February, 2018.

ROBERT W. FERGUSON
Attorney General

*s/Allyson S. Zipp*
ALLYSON S. ZIPP, WSBA No. 38076
Assistant Attorney General

## DECLARATION OF SERVICE

I declare that on this 6th day of February, 2018, I caused to be electronically filed the foregoing document with the Clerk of the Washington State Supreme Court using the CM/ECF system, which will also send notification of this filing to the following.

Lincoln Beauregard
Julie A. Kays
Connelly Law Offices
2301 N 30th Street
Tacoma, WA 98403

Nelson C. Fraley, II
Faubion, Reeder, Fraley & Cook, P.S.
5316 Orchard Street West
University Place, WA 98467

Philip A. Talmadge
Sidney C. Tribe
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Seattle, WA 98126

Valerie D. McOmie
Attorney at Law
4549 NW Aspen Street
Camas WA 98607

Daniel E. Huntington
Attorney at Law
422 W. Riverside, Suite 1300
Spokane WA 99201

Rebecca J. Roe
Schroeter, Goldmark & Bender
810 Third Ave., Suite 500
Seattle WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of February, 2018, at Tumwater, Washington.

*s/ Amanda Trittin*
Amanda Trittin, Legal Assistant

## ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

## February 06, 2018 - 2:39 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 94529-2 |
| **Appellate Court Case Title:** | HBH; SAH; and Trey Hamrick v. State of Washington, et al. |
| **Superior Court Case Number:** | 11-2-15110-2 |

**The following documents have been uploaded:**

- 945292_Briefs_20180206143453SC092449_1441.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  *The Original File Name was AmiciResponse_FINAL.pdf*
- 945292_Motion_20180206143453SC092449_4552.pdf
  This File Contains:
  Motion 1 - Overlength Brief
  *The Original File Name was PetMtnOverlengthAmiciAns.pdf*

**A copy of the uploaded files will be sent to:**

- atgmitortacef@atg.wa.gov
- bmarvin@connelly-law.com
- bonitaf@richter-wimberley.com
- chanson@alliancelg.com
- danhuntington@richter-wimberley.com
- gregorys1@atg.wa.gov
- jkays@connelly-law.com
- lincolnb@connelly-law.com
- matt@tal-fitzlaw.com
- mfolsom@connelly-law.com
- nfraley@alliancelg.com
- peterh@atg.wa.gov
- phil@tal-fitzlaw.com
- roe@sgb-law.com
- sidney@tal-fitzlaw.com
- torolyef@atg.wa.gov
- valeriemcomie@gmail.com

**Comments:**

---

Sender Name: Amanda Trittin - Email: AmandaC@atg.wa.gov
**Filing on Behalf of:** Allyson Zipp - Email: allysonz@atg.wa.gov (Alternate Email: )

Address:
PO Box 40126
Olympia, WA, 98504-0126
Phone: (360) 586-6300

**Note: The Filing Id is 20180206143453SC092449**